

No. 66174-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.
HUONG VAN,
Appellant.

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COURT OF APPEALS DIVISION
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Teresa Doyle

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering judgment on the verdict of theft in the first degree.

2. Insufficient evidence was presented to support Van's conviction for theft in the first degree.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

In Washington, as in the majority of jurisdictions, to support a charge of larceny from a person (i.e., theft in the first degree), the State must prove that property was physically taken from the victim. This requirement of "theft by taking" reflects the Courts' and Legislature's acknowledgment that such a taking creates a risk of confrontation between the victim and the defendant and constitutes a serious invasion of the victim's privacy. Here, the facts established a "theft by deception": the victim voluntarily surrendered the property, only later realizing that he had been tricked into relinquishing it. Did the State fail to prove a "theft by taking," as required to sustain a conviction for theft in the first degree?

C. STATEMENT OF THE CASE

Appellant Huong Van, a community college student, and several neighborhood friends were hanging out one November

evening in South Seattle. 4RP 152; 6RP 41.¹ They were bored and smoking marijuana and eventually became very hungry. 5RP 12. They wanted pizza but unfortunately, none of them had any money. Id.

Van used to work for Pizza Hut and came up with an idea whereby they could get pizza for free. 5RP 44-46. When he worked at Pizza Hut, it had been his experience that customers frequently tricked delivery drivers out of food. 5RP 44. These events were never investigated or prosecuted by the police unless a weapon was involved. Id.

Van proposed to his friends that they try to trick a pizza delivery driver out of some pizza. 4RP 161-62. They all thought this was a good idea and identified a nearby residence, Katherine's Place, as the best place for their plan because it had a security entrance. 4RP 162; 5RP 47. Van also was aware that the building had security cameras and believed that this would be a good

¹ The verbatim report of proceedings is referenced herein as follows:

August 2, 2010 (morning)	-	1RP
August 2, 2010 (afternoon)	-	2RP
August 3, 2010	-	3RP
August 4, 2010	-	4RP
August 5, 2010	-	5RP
August 9, 2010 (morning)	-	6RP
August 9, 2010 (afternoon)	-	7RP
August 10, 2010	-	8RP
September 17, 2010	-	9RP
October 29, 2010	-	10RP

location to execute their plan so that no one could later claim that weapons or force were used. 5RP 47.

They went to a nearby Domino's pizzeria and obtained a pamphlet with its telephone number. 5RP 162. Using Van's cell phone, they ordered several pizzas, some chicken, and two liters of soda. 4RP 29. They then drove to Katherine's Place where one of the boys, Joshua Sum, waited in Van's car at the other side of the building. 5RP 13; 6RP 15.

They had given Domino's an incorrect apartment number so that when the delivery driver, Hieu Phan, arrived he had to call them. 4RP 29. The boys told Phan that they would come downstairs and meet him at the gate. Downstairs, they opened the gate to the courtyard and told him they wanted to check the pizza to make sure the order was correct. 5RP 19. Because of the order's size, Phan was unable to hold everything while they checked the order. 5RP 49. Phan handed them the pizzas and they told him that they had forgotten their money in their apartment and he should follow them. 5RP 19.

At the building, another boy, Alex Mai, was holding the secured entrance door open. 5RP 19. When the boys reached the door they ran inside and let the door close and lock before Phan

could enter. 5RP 29, 48-49. They then ran through the building to where Sum was waiting in the car. 5RP 20; 6RP 52. They drove a couple of blocks away and ate their pizza. 6RP 52.

After they ate all the pizza they put the trash in a Domino's box and drove to the restaurant that they had ordered from. Sum wrote, "thank you," and the date, and drew a smiley face on the box, and they left the box at the restaurant's doorstep. 4RP 96-97, 125, 6RP 17.

Phan claimed that after he handed over the pizzas two other boys threatened him with a gun to drop his possessions. 4RP 36. He was frightened, put everything on the ground and ran, and then reported the incident to his supervisor and the police. 4RP 36, 41, 84. The State charged Van in King County Superior Court with one count of robbery in the first degree and, in the alternative, with one count of theft in the first degree, and the matter proceeded to a jury trial.² CP 7-8.

The jury rejected Phan's allegations of force, acquitted Van of robbery as charged in count I, and convicted him of the lesser included offense of theft in the third degree. With respect to count II, the jury convicted Van as charged of theft in the first degree. CP

² The other participants in the offense were juveniles and entered deferred dispositions in juvenile court.

47-51. Van moved to vacate the theft in the first degree charge on the basis that the verdicts were inconsistent, but the court denied the motion. CP 87-92, 93. Van appeals. CP 100.

D. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THEFT IN THE FIRST DEGREE "FROM THE PERSON OF ANOTHER," INSTEAD ESTABLISHING A THEFT BY DECEPTION.

The jury disbelieved the State's theory that Van and his friends used force or any threat to induce Phan to give them the pizza. Instead, the evidence showed that Phan willingly handed the pizza to Van and his friends so that they could inspect it. Once Phan handed them the pizza, Van and his friends deceived Phan into believing that if he followed them to "their apartment," they would pay for the food they had ordered. This evidence does not establish that the crime of theft in the first degree was committed. Rather, Van and his friends committed the crime of theft by deception, and the court erred in entering judgment on the first degree theft conviction.

1. The Legislature expressly distinguishes theft by taking from theft by deception as alternative means. "Theft", according to RCW 9A.56.020(1), means:

(a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him of such property or services; or

(b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him of such property or services . . .

RCW 9A.56.020. The Supreme Court has noted that “[s]ubsection (a) is known as theft by taking while subsection (b) is known as theft by deception.” State v. Smith, 115 Wn.2d 434, 438, 798 P.2d 1146 (1990) (citing State v. Southard, 49 Wn. App. 59, 741 P.2d 78 (1987)).

The term “by color or aid of deception” is further defined as, “to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.010(4). Finally:

(5) “Deception” occurs when an actor knowingly:

(a) Creates or confirms another’s false impression which the actor knows to be false; or

(b) Fails to correct another’s impression which the actor previously has created or confirmed; or

(c) Prevents another from acquiring information material to the disposition of the property involved; or

. . .

(e) Promises performance which the actor does not intend to perform or knows will not be performed[.]

RCW 9A.56.010(5).

In State v. Casey, 81 Wn. App. 524, 915 P.2d 587 (1996), this Court analyzed the evolution of the crime of “theft by deception” from the offense of “larceny.” 81 Wn. App. 528. This Court noted that the Legislature’s intent was to “broaden the scope of the statute to include more kinds of devious behavior.” Id. This Court explained:

deception appears . . . designed to encompass not only representations about past or existing facts, but also representations about future facts, inducement achieved by means other than conduct or words, and inducement achieved by creating a false impression even though particular statements or acts might not be false.

Id.

2. Under Washington law, theft in the first degree from the person of another requires proof of physical taking from the victim’s person. A prosecution for “theft in the first degree”, where not predicated on the value of the property, involves “theft by taking” and requires proof that property is physically taken from the person of another. RCW 9A.56.030(1)(b); see State v. Tvedt, 153 Wn.2d 705, 723 n. 2, 107 P.3d 728 (2005) (describing theft in the first

degree as “the mere taking of property from the person of another, e.g., pick-pocketing”).

Following this reasoning, in State v. Nam, 136 Wn. App. 698, 150 P.3d 617 (2007), a prosecution where the State omitted the “in the presence” language from its jury instructions defining robbery, the Court strictly construed “from the person” as requiring taking “something on the person’s body or directly attached to someone’s physical body or clothing.” 136 Wn. App. at 705. Because this literal construction precluded the taking of items within a victim’s “easy reach,” the Court held that the taking of the victim’s purse from the passenger seat of her car was not a taking from her person. Id.

The Ninth Circuit Court of Appeals applied Nam’s holding to the question whether a Washington conviction for theft in the first degree would be a violent felony under the federal Armed Career Criminal Act (ACCA). United States v. Jennings, 515 F.3d 980, 989 (9th Cir. 2008). The Court concluded that “theft from the person of another under Washington law means theft of ‘something on or attached to a person’s body or clothing’” creating a “serious potential risk of physical injury to another” as required for the offense to qualify under ACCA. Id. at 989-90.

Courts in other jurisdictions have similarly construed comparable out-of-state statutes. For example, in California, the crime of “grand theft” from a person is proved when a person snatches a purse, or steals someone’s wallet from his pocket. Compare People v. Huggins, 51 Cal. App. 4th 1654, 60 Cal. Rptr. 2d 177 (1997) (elements of “grand theft” established where purse was snatched from under victim’s foot; “the victim’s purpose in placing the purse against her foot was to retain dominion and control over the purse”) with People v. Williams, 9 Cal.App.4th 1465, 12 Cal. Rptr. 2d 253 (1992) (evidence insufficient to establish “grand theft” where purse taken from passenger seat next to victim); see also People v. Morales, 49 Cal. App. 3d 134, 122 Cal. Rptr. 157 (1975) (equivocal evidence regarding use of force during purse-snatching supported issuance of grand theft lesser included offense instruction in felony murder prosecution predicated on robbery); People v. Herrin, 82 Cal.App.2d 795, 796, 187 P.2d 26 (1947) (wallet stolen from victim while he was unconscious).

In Illinois, evaluating the question whether a taking must literally be from a victim’s person or whether the crime is established where the property was in his presence and immediate control, the Supreme Court noted that the sole distinction between

a common-law larceny and robbery “lies in the force or intimidation used.” People v. Pierce, 226 Ill.2d 470, 478-80, 877 N.E.2d 408 (2007).

New Jersey likewise requires that for a “theft from the person” the property must be taken from the victim’s possession and while in his immediate presence, creating a danger of confrontation between the thief and victim and an invasion of the victim’s person and privacy. State v. Blow, 132 N.J. Super. 487, 491, 334 A.2d (1975) (citing cases from other jurisdictions); accord State v. Link, 197 N.J. Super. 615, 619, 485 A.2d 1069 (1984).

As the discussions in Jennings, Blow and Pierce demonstrate, statutes ascribing a high seriousness level to the taking of property from the person of another do so because such taking creates a danger of confrontation between thief and victim and involve an invasion of the victim’s privacy. See Jennings, 515 F.3d at 689; Blow, 132 N.J. Super. at 491; Pierce, 226 Ill. 2d at 478-80.

3. Because it does not involve a physical taking from the person of another, a theft by deception is not a theft in the first degree. As noted, almost universally at common law a larceny from a person is defined by the physical act of taking property from

another's person, in part because of the risk of confrontation and danger such a theft creates. By definition, a theft by deception means that the victim was somehow tricked into relinquishing his property voluntary "under color or aid of deception." The persuasive authorities discussed above support a distinction between "theft by taking" which, if done from the person of another, is a first-degree theft and "theft by deception," which is not.

A decision from this Court interpreting the "theft by deception" statute is also instructive. In State v. Mermis, 105 Wn. App. 738, 20 P.3d 1044 (2001), Mermis fraudulently obtained Terry Johnson's valuable Dodge Viper automobile and subsequently persuaded him to execute a title and bill of sale. Id. at 741-42. Johnson, believing Mermis to be a man of substantial means, agreed to a sale for \$55,000 and told his wife "to give the keys to Mermis because Mermis 'wanted to drive it.'" Id. at 742. Mermis never paid for the car and refused Johnson's demands that it be returned. The State ultimately filed an information alleging that Mermis,

on or about September 26, 1995, with intent to deprive another of property, to-wit: a Dodge Viper having a value in excess of \$1,500, did obtain control over such property belonging to Terry Johnson by

color and aid of deception, and, did exert unauthorized control over such property[.]

Id. at 742 n. 5.

The issue on appeal was whether the prosecution was barred by the statute of limitations or whether Mermis' actions in obtaining the title and bill of sale constituted a continuing criminal impulse, enabling prosecution within the limitations period. Id. at 743-45. In analyzing the question, this Court noted that "[t]he UCC makes a distinction between theft by deception and theft by taking, such that one who commits theft by deception acquires voidable title, while one who commits theft by taking acquires no title at all." Id. at 748 n. 5 (citation omitted). This Court observed that while Washington has not adopted the provision that embodies that distinction, "Our cases nonetheless embrace it, generally recognizing a difference between 'outright theft' (theft by trespass) and theft by deception." Id. (citing cases).

The evidence in Mermis established that Johnson's wife was instructed to hand Mermis the keys to the car under the mistaken belief that Mermis intended to pay for it. 105 Wn. App. at 742. This was not a theft from Johnson's wife's person as no "taking" occurred; it was a theft by deception.

Several hypotheticals help to illustrate this principle.

Imagine, for example, a traveler at an airport. He hands his luggage to a person who claims to be a taxi driver. That person takes the luggage and drives away. This scenario describes a theft by deception, not a theft by taking, and thus would not support a conviction for theft in the first degree.

A woman in a shop intends to steal a valuable dress. A shop assistant hands the dress to the woman to try on, and in the dressing room the woman removes the tags from the dress, puts on her coat, and wears the dress out of the store. According to the State's theory in this case, the woman would have committed a theft in the first degree. But as in this case, the shop assistant willingly surrendered control over the dress to the woman, believing she intended to pay for it. The dress was not "taken" from her; rather, she was deceived into relinquishing control over it.

This Court should conclude that a prosecution for first-degree theft from the person of another pursuant to RCW 9A.56.030(1)(b) necessarily requires proof of an actual taking, and excludes theft by deception.

4. The evidence viewed in the light most favorable to the State showed only that a theft by deception occurred. The jury

convicted Van of theft in the third degree as a lesser included offense to robbery and in the alternative of theft in the first degree. Because the evidence did not establish a taking from Phan's person, but only a theft by deception, the theft in the first degree conviction must be vacated and dismissed, and this matter remanded for reinstatement of the theft in the third degree conviction and resentencing.

When the sufficiency of the evidence is challenged, the court must view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The jury acquitted Van of robbery in the first degree and the lesser included offense of robbery in the second degree. CP 47-48. The jury thus necessarily rejected the State's theory that a gun or even a threat of force was involved in the crime.

Thus, the question that remains is whether Van and his friends physically wrested the pizza from Phan or whether they

tricked him into giving it to them. Phan testified that the boys “grabbed” the pizza and that he was still holding on when they took it from him. 4RP 33. But the evidence does not support Phan’s testimony. The security video from the Katherine’s Place apartment complex shows Phan handing the pizzas one by one to one of the boys. Ex. 2.³ Phan’s testimony notwithstanding, under no reasonable construction of the evidence can it be said that the boys “grabbed” the pizza from Phan.

In sum, Phan willingly handed the pizzas to the boys, believing that they were checking the order’s accuracy. 4RP 33, 75; Ex. 2. “By color or aid of deception” Van and his cohorts “obtain[ed] control over the property . . . with intent to deprive [Phan] of such property.” RCW 9A.56.020. The State did not prove a theft in the first degree.

5. The remedy is vacation and dismissal of the theft in the first degree conviction and reinstatement of the theft in the third degree conviction. “The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.” Burks v. United States, 437 U.S. 1, 11, 98 S.Ct. 2141, 57 L.Ed.2d 1

³ The transaction appears in the third video ‘frame’ (second segment), entitled MLK 110709 10:37 pm 002 (duration 30 seconds).

(1978). Van's conviction for theft in the first degree must therefore be reversed and dismissed. Upon dismissal and vacation of the theft in the first degree conviction, the theft in the third degree conviction that was dismissed may be reinstated. See State v. Turner, 169 Wn.2d 448, 461 n. 7, 465 n. 11, 238 P.3d 461 (2010) ("a lesser conviction previously vacated on double jeopardy grounds can be reinstated following the appellate reversal of a defendant's more serious conviction based on the same criminal conduct").

E. CONCLUSION

For the foregoing reasons, this Court should conclude that the State proved only a theft by deception and, by extension, did not prove a theft in the first degree. Van's conviction for theft in the first degree must be reversed and dismissed.

DATED this 8th day of August, 2011.

Respectfully submitted:

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Respondent,)	
)	NO. 66174-4-I
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HUONG TAN VAN,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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